

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

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| In the Matter of the Appeal by |) | BOARD DECISION |
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| CALIFORNIA HIGHWAY PATROL |) | PSC No. 06-05 |
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| From the Executive Officer's September 28, 2006 Disapproval of a Contract for Custodial Services between the California Highway Patrol and Moran Janitorial Services |) | April 3, 2007 |
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APPEARANCES: Anne M. Giese, Attorney, on behalf of Service Employees International Union, Local 1000 (California State Employees' Association); Barrett W. McInerney, Labor Relations Counsel, Department of Personnel Administration, on behalf of California Department of the Highway Patrol.

BEFORE: Sean Harrigan, President, Anne Sheehan, Vice President; Patricia Clarey and Richard Costigan, Members.

DECISION

This matter is before the State Personnel Board (SPB or Board) after the California Highway Patrol (CHP) appealed from the Executive Officer's September 8, 2006 decision disapproving a contract (Contract) between the CHP and Moran Janitorial Services to provide custodial services for the CHP at its San Bernardino office.

In this decision, the Board finds that the Contract is not justified pursuant to the provisions of Government Code section 19130(b), and that the Executive Officer's Decision disapproving the Contract should be sustained.

BACKGROUND

CHP began contracting for custodial services at its San Bernardino Area Office after one of two civil service custodial employees employed at that office left

in 2003 and that position was eliminated by the Department of Finance due to the State's budget crisis. Service Employees International Union (SEIU), Local 1000, asserts that this work can be done adequately and competently by civil service employees, and that the State's failure to allocate sufficient staff positions to perform the required function does not justify contracting out, as set forth in *Professional Engineers in California Government v. Department of Transportation*.¹

PROCEDURAL HISTORY

By letter dated June 30, 2006,² pursuant to Government Code section 19132 and SPB Rule 547.59 et seq., SEIU requested SPB to review the Contract for compliance with Government Code section 19130, subdivision (b). After receiving the submissions of the parties, the Executive Officer issued a decision dated September 28, 2006, disapproving the Contract on the ground that CHP had failed to establish that the Contract was justified under any of the exceptions set forth in Government Code section 19130, subdivision (b).

By letter dated October 23, 2006, CHP appealed to the Board from the Executive Officer's decision. CHP filed its opening brief on February 2, 2007.³ SEIU filed its response on February 21, 2007.

¹ (1997) 15 C.4th 543, 571-572.

² Although the Executive Officer's decision states that the request was dated August 17, 2006, the SPB's records reflect that the original request, dated June 30, 2006, was received by the SPB Security Desk on June 30, 2006, and was resubmitted at SPB's request on August 17, 2006.

³ By letter dated November 15, 2006, CHP requested that the briefing and oral argument schedule previously provided to the parties be revised. By letter dated November 21, 2006, Board staff rescheduled oral argument to March 6, 2007 and set the following briefing schedule: January 19, 2007: CHP submits its opening brief; February 2, 2007: SEIU submits its response; February 9, 2007: CHP submits its reply. No further extensions were requested by either party. CHP did not submit its opening brief until February 2, 2007. By letter dated February 8, 2007, the SPB afforded SEIU the opportunity to file a response to CHP's late-filed brief by February 21, 2007. Due to the short time before oral argument before the Board, CHP was not permitted to file a reply brief.

The Board has reviewed the entire record for this case, including the oral and written arguments submitted by the parties, and now issues the following decision.

ISSUE

The following issue is before the Board for review:

Is the Contract justified under Government Code section 19130, subdivisions (b)(3) or (8)?

POSITIONS OF THE PARTIES

In his September 28, 2006 Decision, the Executive Officer determined that the Contract should be disapproved because it failed to meet the criteria for approval under Government Code section 19130, subdivisions (b)(3) or (8). While recognizing that CHP was “placed between the proverbial ‘rock and a hard place’,” the Executive Officer determined that, under *Professional Engineers* and the Board’s decision in *In the Matter of the Appeal by SEIU*,⁴ the State’s failure to allocate sufficient civil service staff positions to perform necessary work will not serve to authorize the private contracting of work traditionally performed by the state civil service. Because CHP failed to establish that the work could not be performed adequately and competently by civil service employees, the Executive Officer recommended that the Contract be disapproved.

CHP asserts that the decision of the Executive Officer should be reversed because its inability to staff the necessary position through the civil service is based not on any fault of its own, but solely upon the failure of the Department of Finance and the Legislature to authorize funding for the position that was eliminated due to

⁴ (2005) PSC No. 05-03.

the state's budget crisis. CHP asserts that it attempted to secure civil service employees from other state departments but was unable to do so. CHP further asserts that the Board has improperly expanded the holding of *Professional Engineers* beyond the facts of that case, and that CHP has met the criteria for contracting out under Government Code sections 19130(b)(3) and (8).

SEIU contends that, pursuant to the decision of the California Supreme Court in *Professional Engineers* and the Board's decisions in *In the Matter of the Appeal by SEIU, CAPS/Department of Pesticide Regulation*,⁵ and *State Compensation Insurance Fund*,⁶ the Executive Officer correctly determined that the Contract cannot be approved based upon the state's failure to adequately fund the positions. SEIU asserts that civil service employees are available to perform the work. SEIU further asserts that CHP has failed to demonstrate that it sought to have the funding it lost restored, and that CHP had already begun the contracting process before it attempted to obtain personnel from three other agencies.

LEGAL PRINCIPLES

In *Professional Engineers in California Government v. Department of Transportation*,⁷ the California Supreme Court recognized that, emanating from Article VII of the California Constitution, is an implied "civil service mandate" that prohibits state agencies from contracting with private entities to perform work that the state has historically and customarily performed and can perform adequately and competently. Government Code section 19130 codifies the exceptions to the civil

⁵ (2002) PSC No. 01-09.

⁶ (2003) PSC Nos. 03-06, 03-07, 03-08.

⁷ *Supra*, 15 Cal.4th at p. 547.

service mandate recognized in various court decisions. The purpose of SPB's review of contracts under Government Code section 19130 is to determine whether, consistent with Article VII and its implied civil service mandate, state work may legally be contracted to private entities or whether it must be performed by state employees.

Government Code section 19130, subdivision (b)(3), authorizes a state agency to enter into a personal services contract with a private contractor when:

The services contracted are not available within civil service, cannot be performed satisfactorily by civil service employees, or are of such a highly specialized or technical nature that the necessary expert knowledge, experience, and ability are not available through the civil service system.

Government Code section 19130, subdivision (b)(8), authorizes a state agency to enter into a personal services contract with a private contractor when:

The contractor will provide equipment, materials, facilities, or support services that could not feasibly be provided by the state in the location where the services are to be performed.

In order to justify a contract under Government Code § 19130(b)(3), a state agency must show that the contracted services are not available through the civil service system; i.e., there are no existing civil service job classifications through which the state agency could appoint or retain employees with the knowledge, skills, expertise, experience or ability needed to perform the required work.⁸ Government Code § 19130(b)(3) does not apply when the services could be performed through the civil service system, but not enough civil service employees are currently

⁸ *Department of Pesticide Regulation*, PSC No. 01-09, at p. 13.

employed to perform those services.⁹ As the Board stated In *Department of Pesticide Regulation*,

The civil service mandate applies to the state as a whole and provides that the state, as a whole, must use civil service employees whenever those employees can perform the state's work adequately and competently.¹⁰

The failure of the state to employ sufficient civil service personnel to perform the state's business cannot be used to create an exemption to the civil service mandate. As determined by the Board in *State Compensation Insurance Fund*, the imposition by the state of a hiring freeze and the refusal of the Department of Finance to approve an exemption to the freeze is insufficient to justify contracting out under Government Code section 19130(b)(3) or (8), when a state department could otherwise obtain qualified civil service staff to perform the contracted services if it were not precluded from doing so by the hiring freeze.¹¹

DISCUSSION

CHP asserts that, because the elimination of one of the custodian positions in its San Bernardino office in 2003 by the Department of Finance was beyond CHP's control, it should be allowed to contract out the position. As in *State Compensation Insurance Fund*, any inability of CHP to fill the position due to restraints placed upon it by the Department of Finance is simply insufficient to establish an exemption to the constitutional mandate that civil service work be performed by civil service employees. Moreover, CHP has failed to establish that it took any steps to restore the funding it lost for the position in 2003 at any time prior to contracting out in

⁹ *Id.*

¹⁰ *Id.*, at p. 14.

¹¹ PSC Nos. 03-06, 03-07, 03-08 at p. 12.

2006.¹² At a minimum, CHP could have sought to regain funding through the budget change proposal (BCP) process prior to contracting out. Instead, the record reflects that CHP fully intended to contract out the work, and made only a half-hearted attempt to obtain civil service employees from other departments after it had already begun the contracting process.

There is no dispute that the custodial services CHP sought to contract out are services that have historically been performed adequately and competently by civil service employees. Indeed, CHP continues to employ a civil service custodian to perform this work. CHP has not disputed the information provided by SEIU that shows that many civil service custodians live and work in the San Bernardino area. The only issue is whether the elimination of the position from CHP's budget creates the necessary justification for contracting out. While the Board is mindful of the challenges state agencies face in performing their statutory duties in the face of shrinking budgets, the state cannot create an artificial need for private contractors by refusing to hire sufficient numbers of civil service employees to perform its work, and then rely upon the workforce shortage it has created to justify the hiring of private contractors.¹³

CONCLUSION

CHP has failed to establish that its need for contracting out one position in its San Bernardino office arises from anything other than the elimination of funding for that position through the state budget process and CHP's failure to seek restoration

¹² At oral argument, counsel for CHP conceded that CHP has contracted out the position since approximately 2003.

¹³ *State Compensation Insurance Fund*, at p. 11, citing *Professional Engineers v. CalTrans*, *supra*.

of the funding for that position. The Executive Officer's decision disapproving the Contract was correct and is affirmed.

ORDER

The Board finds that Contract No. 6C860004-0 entered into between the California Highway Patrol and Moran Janitorial Services, for the provision of custodial services at CHP's San Bernardino office is not justified under either Government Code section 19130, subdivisions (b)(3) or (8). Accordingly, the Contract is hereby disapproved.

STATE PERSONNEL BOARD¹⁴

Sean Harrigan, President
Anne Sheehan, Vice President
Patricia Clarey, Member
Richard Costigan, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on April 3, 2007.

Floyd Shimomura
Executive Officer
State Personnel Board

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¹⁴ Member Tom did not participate in this decision.